

IN THE SUPREME COURT OF THE STATE OF NEVADA

RUEL SALVA MERCADO,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 35006

FILED

JUN 03 2002

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *J. Richards*
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE IN PART AND REVERSAL AND REMAND

IN PART

This is a proper person appeal from an order of the district court denying appellant's post-conviction petition for a writ of habeas corpus.

On December 19, 1995, the district court convicted appellant, pursuant to a jury verdict, of one count of first degree murder with the use of a deadly weapon with the intent to promote, further or assist a criminal gang, one count of attempted murder with the use of a deadly weapon with the intent to promote, further or assist a criminal gang, one count of burglary while in possession of a deadly weapon with the intent to promote, further or assist a criminal gang, three counts of attempted robbery with the use of a deadly weapon with the intent to promote, further or assist a criminal gang, two counts of first degree kidnapping with the use of a deadly weapon with the intent to promote, further or assist a criminal gang, and ten counts of coercion with the use of a deadly

weapon with the intent to promote, further or assist a criminal gang. The district court sentenced appellant to serve two consecutive terms of life in the Nevada State Prison without the possibility of parole and consecutive determinate terms totaling eighty-five years.¹ This court dismissed appellant's direct appeal from his judgment of conviction and sentence.²

On March 25, 1999, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The State opposed the petition. Pursuant to NRS 34.750 and 34.770, the district court declined to appoint counsel to represent appellant or to conduct an evidentiary hearing. On September 21, 1999, the district court denied appellant's petition.³ This appeal followed.

In his petition, appellant raised four claims of ineffective assistance of trial counsel. To state a claim of ineffective assistance of

¹The remainder of appellant's terms were imposed to run concurrently.

²Mercado v. State, Docket No. 27877 (Order Dismissing Appeal, April 9, 1998).

³In denying his petition, the district court concluded that appellant improperly attempted to "piggyback" direct appeal claims by incorporating them under a claim of ineffective assistance of counsel and thus declined to reach the merits of the claims. We conclude that the district court erred. Appellant, a proper person litigant, properly incorporated his claims under the umbrella of ineffective assistance of counsel.

counsel sufficient to invalidate a judgment of conviction, a petitioner must demonstrate that counsel's performance fell below an objective standard of reasonableness, and that counsel's errors were so severe that they rendered the jury's verdict unreliable.⁴ The court need not consider both prongs of the Strickland test if the petitioner makes an insufficient showing on either prong.⁵

First, appellant claimed that his trial attorneys were ineffective for failing to file a motion to dismiss the charge of first degree murder for lack of jurisdiction due to the absence of a coroner's inquest. Appellant believed that a coroner's inquest was necessary to vest jurisdiction in the justice's court. Appellant further believed that his trial attorneys were ineffective for failing to investigate the procedures related to coroner's inquests. We conclude that appellant failed to demonstrate that the performance of his attorneys was deficient or that he was prejudiced. Appellant's jurisdictional claim lacked merit. A criminal complaint charging appellant with, among other things, first degree murder with the use of a deadly weapon was filed in the justice's court. The absence of a coroner's inquest did not cause the justice's court and the

⁴Strickland v. Washington, 466 U.S. 668 (1984); Warden v. Lyons, 100 Nev. 430, 683 P.2d 504 (1984).

⁵Strickland, 466 U.S. at 697.

district court to lack subject matter jurisdiction. NRS 259.050(3) provides, "The holding of a coroner's inquest is within the sound discretion of the district attorney or district judge of the county." It was not disputed at trial that the victim died as the result of a homicide, the killing of one human being by another, when the victim was shot in the back during the attempted robbery of Renata's.⁶ Thus, a motion to dismiss for lack of jurisdiction due to the absence of a coroner's inquest would not have succeeded. Therefore, we conclude that this claim lacked merit.

Second, appellant claimed that his trial attorneys were ineffective for failing to have excused juror #28 during voir dire on the ground of bias. Specifically, he claimed that juror #28 was biased because she indicated on a jury questionnaire that she agreed with the statement that if the prosecutor went to the trouble of bringing a defendant to trial that the defendant was probably guilty. We conclude that appellant failed to demonstrate that his attorneys were ineffective in this regard. There was no basis to dismiss the juror for cause because the record reveals that the juror was not biased against the defendant.⁷ Further, appellant failed to demonstrate that he was prejudiced by his trial attorneys' failure to

⁶The medical examiner testified at trial that a homicide is defined as the killing of one human being by another.

⁷NRS 16.050(1)(g).

exercise a peremptory challenge to juror #28. Trial counsel questioned juror #28 about her answers on the jury questionnaire. When questioned, juror #28 affirmatively indicated that she understood a defendant was presumed innocent and that the standard for finding the defendant guilty was beyond a reasonable doubt. She stated that she accepted that and understood that the State must prove its case based upon the evidence against the defendant. She indicated that she understood that the defendant did not have to prove anything. Juror #28 indicated that she would follow the law as instructed. She stated that she would base her decision upon the evidence that she heard. Thus, there was no indication of a state of mind in the juror evincing bias. Therefore, this claim lacks merit.

Third, appellant argued that his trial attorneys were ineffective for failing to move for a mistrial and challenge evidence and testimony. Appellant believed that his attorneys should have moved for a mistrial due to the fact that the prosecutor introduced the bullet recovered during the autopsy of the victim even though ballistics could not conclusively establish the bullet came from a gun fired by appellant. Appellant claimed that no testimony about the bullet should have been allowed by the district court. Appellant also challenged testimony about the two other bullets recovered at the scene. Appellant, it appears, assumed that he could not be convicted of first degree murder unless the State conclusively proved that he had fired the fatal shot. Appellant failed

to demonstrate that the performance of his attorneys was deficient or that he was prejudiced. A motion for mistrial on the ground alleged by appellant would not have succeeded. It was undisputed at trial that the victim, Gerald Serna, was shot during the attempted robbery of Renata's and that the cause of death was the gunshot wound. The fact that ballistics could not conclusively establish that the bullets came from a gun fired by appellant did not render the bullets or testimony about the bullets inadmissible. Contrary to appellant's assumption, because the murder occurred during the course of the burglary and attempted robbery it did not matter which of the three gunmen actually fired the gun; they were each liable for the murder under the felony-murder rule.⁸ Further, the evidence presented at trial, including appellant's admission to a fellow gang member, established that appellant participated in the attempted robbery and fired the shot that had killed Serna. Therefore, this claim lacked merit.

Fourth, appellant claimed that his trial attorneys were ineffective for failing to impeach Richard Little, the ballistics expert, with ballistics reports. Although appellant implied that there were

⁸Garner v. State, 116 Nev. 770, 6 P.3d 1013 (2000) (holding that under the felony-murder rule, by conspiring to commit robbery, the defendant was liable for the murder perpetrated in the course of the robbery).

inconsistencies between the ballistics reports and Little's testimony, appellant failed to present any specific facts in support of this claim. Therefore, appellant failed to demonstrate that his attorneys were ineffective in this regard.

Next, appellant raised nineteen claims of ineffective assistance of appellate counsel.⁹ "A claim of ineffective assistance of appellate counsel is reviewed under the 'reasonably effective assistance' test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984)."¹⁰ Appellate counsel is not required to raise every non-frivolous issue on appeal.¹¹ This court has held that appellate counsel will be most effective when every conceivable issue is not raised on appeal.¹² "To establish prejudice based on the deficient assistance of appellate counsel, the

⁹To the extent that appellant raised any of his claims independently from his ineffective assistance of appellate counsel claims, appellant waived these issues. See *Franklin v. State*, 110 Nev. 750, 877 P.2d 1058 (1994) overruled on other grounds by *Thomas v. State*, 115 Nev. 148, 979 P.2d 222 (1999). We nevertheless address appellant's claims in connection with his contention that appellate counsel should have raised the claims on direct appeal.

¹⁰*Kirksey v. State*, 112 Nev. 980, 998, 923 P.2d 1102, 1113 (1996).

¹¹*Jones v. Barnes*, 463 U.S. 745, 751 (1983).

¹²*Ford v. State*, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989).

defendant must show that the omitted issue would have a reasonable probability of success on appeal.”¹³

First, appellant claimed that his appellate counsel was ineffective for failing to argue that no subject matter jurisdiction existed because a coroner’s inquest had not been conducted and that the prosecutor committed misconduct by not disclosing that fact and by failing to disclose the relevant statutes relating to a coroner’s inquest. We conclude that appellant failed to demonstrate that these arguments had a reasonable probability of success on appeal. As discussed above, appellant’s jurisdictional claim lacked merit. Therefore, appellant is not entitled to relief on this claim.

Second, appellant claimed that his appellate counsel was ineffective for failing to argue that his due process and fair trial rights were violated when the district court failed to excuse juror #28 for cause because she was biased. This argument did not have a reasonable probability of success on appeal. As discussed above, the record does not establish that juror #28 was biased. The district court was not required to dismiss juror #28 for cause. Therefore, this claim lacks merit.

Third, appellant claimed that his appellate counsel was ineffective for failing to argue that his due process and fair trial rights

¹³Kirksey, 112 Nev. at 998, 923 P.2d at 1114.

were violated when the district court expressed personal bias during voir dire. Specifically, appellant complained that the district court remarked that juror #26 was left-brain dominant like Mr. Spock and that the district court would not be comfortable being judged by a jury entirely composed of left-brain individuals. Appellant failed to demonstrate that his counsel's performance was deficient or that this issue had a reasonable probability of success on appeal. Appellant failed to demonstrate that these remarks indicated any bias on the part of the district court. Therefore, this claim lacked merit.

Fourth, appellant claimed that his appellate counsel was ineffective for failing to argue that the State's evidence was inconclusive and only implied his guilt. Further, he claimed that because the evidence was inconclusive the jury must have ignored the reasonable doubt instruction. Appellant failed to demonstrate that this issue had a reasonable probability of success on appeal. Appellant failed to provide any specific facts in support of this argument.¹⁴ Therefore, this claim lacked merit.

Fifth, appellant claimed that his appellate counsel was ineffective for failing to argue that the district court improperly allowed the testimony of William Murr. Appellant believed that because Murr was

¹⁴Hargrove v. State, 100 Nev. 498, 686 P.2d 222 (1984).

not able to identify appellant as one of the three masked gunmen that his testimony was inadmissible. Appellant failed to demonstrate that his counsel's performance was deficient or that this argument had a reasonable probability of success on appeal. NRS 50.025 provides that a witness may testify if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Murr had personal knowledge of the attempted robbery at Renata's. Murr was a bartender at Renata's and was on duty during the attempted robbery. Murr testified about his recollection of the attempted robbery, including the fact that he was shot by one the masked gunmen. Therefore, this claim lacked merit.

Sixth, appellant claimed that his appellate counsel was ineffective for failing to argue that the prosecutor failed to produce positive identification of appellant as the shooter of Serna. We conclude that this argument did not have a reasonable probability of success on appeal. As discussed above, contrary to appellant's belief, because the murder occurred during the course of the burglary and attempted robbery it did not matter which of the three gunmen actually fired the gun.¹⁵ Further, the evidence presented at trial established that appellant participated in the attempted robbery of Renata's and that appellant shot

¹⁵Garner, 116 Nev. 770, 6 P.3d 1013.

Serna. Felix Austria testified that he was one of the masked gunmen and identified appellant and George Chuatoco as the other two masked gunmen. Austria testified that both he and appellant were armed with .38 caliber guns and that Chuatoco was armed with a MAC 11 gun. Austria testified that he had shot the bartender and that appellant had shot Serna. A .38 caliber bullet was recovered from the body of Serna, and two other .38 caliber bullets were recovered at the scene. Carl Flores, a fellow gang member that appellant had tried to recruit for the attempted robbery of Renata's, testified that appellant admitted that he had indeed participated in the attempted robbery. Flores also testified that appellant told him that Austria had shot the bartender and that appellant had shot Serna. In the residence of another of the participants in the attempted robbery, Otto Kaufmann, the police recovered walkie-talkies, handcuffs, the key to the stolen vehicle used during the attempted robbery, and one of the guns used during the attempted robbery.¹⁶ The testimony at trial revealed that appellant stayed in Kaufmann's residence at least on a part-time basis and was in fact arrested at Kaufmann's residence. Austria testified that the group used these items in their several attempts to rob

¹⁶The evidence at trial established that Kaufmann helped plan the attempted robbery, provided the guns for the attempted robbery, provided a stolen vehicle to use during the attempted robbery, and waited and drove the getaway car.

Renata's. The stolen vehicle used during the attempted robbery was recovered, and a hair matching appellant's was found in the vehicle. Therefore, this claim lacked merit.

Seventh, appellant claimed that his appellate counsel was ineffective for failing to challenge the testimony of Carl Flores on the grounds that Flores was a paid informant and that his testimony was "purchased." Appellant further argued that there was no corroboration of Flores's testimony. We conclude that appellant failed to demonstrate that the performance of his appellate counsel was deficient or that this issue had a reasonable probability of success on appeal.¹⁷ Special Agent Carolyn Kelliher, an agent with the Federal Bureau of Investigation, testified that after the attempted robbery at Renata's, Flores contacted her with information about the perpetrators of the attempted robbery. Agent Kelliher passed this information to the local police and accompanied Flores when he made his formal statement. Agent Kelliher testified that she had given Flores \$2,500 because of his cooperation in giving information about the attempted robbery and not in exchange for

¹⁷To the extent that appellant argued that his trial counsel was ineffective for failing to object to the testimony of Flores, we conclude that appellant failed to demonstrate that his counsel was ineffective.

providing information.¹⁸ Appellant's trial counsel fully cross-examined Flores and Agent Kelliher about any payments or benefits received for information or cooperation in the Renata's case.¹⁹ Any consideration given affected the weight of Flores's testimony and not the admissibility of his testimony.²⁰ The jury was instructed to consider the credibility of witnesses.²¹ The jury was further instructed that if the jury believed that a witness had lied about a material fact, the jury could disregard any portion of testimony not proved by other evidence or the entire testimony of the witness. Further, there was corroboration of Flores's testimony. Austria's testimony corroborated the testimony provided by Flores. As stated above, the police found physical evidence related to the attempted robbery of Renata's in the Kaufmann residence. Appellant resided in the

¹⁸Agent Kelliher also testified that she had previously given Flores money earlier that year to help pay his medical bills.

¹⁹It appears that the Henderson Police Department fixed Flores's car for him.

²⁰See generally Sheriff v. Acuna, 107 Nev. 664, 819 P.2d 197 (1991) (holding that any consideration promised by the State in exchange for a witness's testimony affects only the weight accorded the testimony, and not its admissibility).

²¹The jury was specifically instructed to consider the witness's "manner upon the stand, his relationship to the parties, his fears, motives, interests or feelings."

Kaufmann residence at least on a part-time basis and was in fact arrested at the Kaufmann residence. A hair matching appellant's was found in the stolen vehicle used during the attempted robbery of Renata's. Therefore, this claim lacked merit.

Eighth, appellant claimed that his appellate counsel was ineffective for failing to challenge Flores's testimony for the following reasons: (1) Flores admitted that he did a drive-by shooting of Flores's girlfriend's house and intended to shoot her, (2) Flores met with the prosecutor several times before testifying at appellant's trial, (3) Flores had undergone seven psychiatric evaluations for emotional problems, (4) Flores admitted that he had a fist fight with appellant in the past, (5) Flores was biased against appellant, and (6) Flores had attempted to commit suicide in the past. We conclude that appellant failed to demonstrate that his appellate counsel's performance was deficient or that he was prejudiced.²² NRS 50.025 provides that a witness may testify if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. The evidence established that Flores had personal knowledge of the attempted robbery of Renata's based upon

²²To the extent that appellant argued that his trial counsel was ineffective for failing to object to the testimony of Flores on these grounds, we conclude that appellant failed to demonstrate that his counsel was ineffective.

his conversations with appellant. The facts presented above go to the weight of Flores's testimony not its admissibility. During the trial, the jury was presented with all of the above-listed facts calling into question Flores's credibility. As discussed above, the jury was properly instructed in what factors to consider in determining the credibility of witnesses. Therefore, appellant is not entitled to relief on this claim.

Ninth, appellant claimed that his appellate counsel was ineffective for failing to argue that the prosecutor improperly presented the testimony of Agent Kelliher. Appellant believed her testimony was improperly admitted because she admitted that she had paid Carl Flores. We conclude that appellant failed to demonstrate that his appellate counsel's performance was deficient or that this issue had a reasonable probability of success on appeal. Agent Kelliher testified as to matters within her personal knowledge.²³ The fact that Agent Kelliher had paid Flores did not render her testimony inadmissible. The jury was presented with the information that Special Agent Kelliher had given Flores money. Therefore, this claim lacked merit.

Tenth, appellant claimed that his appellate counsel was ineffective for failing to argue that the jury was not permitted to hear exculpatory evidence. Specifically, appellant claimed that the district

²³NRS 50.025.

court refused to allow the jury to hear the tape of his interrogation by police. Appellant also stated that the State had a duty to present this tape to the jury. We conclude that appellant failed to demonstrate that his appellate counsel's performance was deficient or that he was prejudiced. Appellant did not indicate what exculpatory information was contained on the tape.²⁴ Detective David McKenna testified that appellant denied his involvement in the attempted robbery at Renata's during the interrogation recorded on the tape. There was no argument that this testimony was inconsistent with the statements made on the tape in question. The State did not have a duty to present this tape to the jury. The district court properly sustained the State's objection to defense counsel's attempted introduction of the tape because the tape was hearsay.²⁵ Therefore, appellant is not entitled to relief on this claim.

Eleventh, appellant claimed that his appellate counsel was ineffective for failing to argue that the judge improperly allowed the testimony of James DeBolt, Gerry Alessia, and Elizabeth Garcia to be presented to the jury. Appellant claimed that these witnesses were

²⁴Hargrove, 100 Nev. 498, 686 P.2d 222.

²⁵NRS 51.065 (providing that hearsay is inadmissible except as provided); NRS 51.035(3) (providing that an out-of-court statement offered for the truth of the matter asserted made by the party attempting to offer the statement is hearsay).

confused about the facts of the attempted robbery and could not identify him as a perpetrator. We conclude that appellant failed to demonstrate appellate counsel's performance was deficient or that this issue had a reasonable probability of success on appeal. These witnesses, present during the attempted robbery of Renata's, testified to what they observed and heard during the attempted robbery.²⁶ The fact that the witnesses could not identify appellant because he was wearing a bandana over his face did not render their testimony inadmissible. Therefore, this claim lacked merit.

Twelfth, appellant claimed that his appellate counsel was ineffective for failing to challenge the testimony of Dr. Robert Jordan, the pathologist who performed the autopsy on Serna, because Dr. Jordan could not state that the bullet came from a gun fired by appellant. We conclude that appellant failed to demonstrate that his appellate counsel's performance was deficient or that he was prejudiced. Dr. Jordan's testimony was not inadmissible because he could not state that the bullet came from a gun fired by appellant. Dr. Jordan's testimony that Serna died from a gunshot wound was properly admitted as probative as to the cause of death of Serna. Therefore, this claim lacked merit.

²⁶NRS 50.025.

Thirteenth, appellant claimed that his appellate counsel was ineffective for failing to argue that the district court abused its discretion in denying his motion for a new trial and that he was denied a full opportunity to cross-examine Felix Austria due to prosecutorial misconduct. The basis of these complaints is that the State failed to present the jury with a redacted copy of Austria's written guilty plea agreement to use during jury deliberations contrary to NRS 175.282.²⁷ We conclude that appellant failed to demonstrate that his appellate counsel was ineffective. Appellate counsel did argue that the district court erred in denying his motion for mistrial. This court considered and rejected this argument, concluding that the defense was "accorded every opportunity to impeach Austria during cross-examination and closing argument" and that concerns raised by NRS 175.282 had been substantially satisfied. Defense counsel acknowledged that he had cross-examined Austria regarding the plea agreement. The doctrine of the law of the case

²⁷NRS 175.282, at the time of the crime and trial provided, "If a prosecuting attorney enters into an agreement with a defendant in which the defendant agrees to testify against another defendant in exchange for a plea of guilty or nolo contendere to a lesser charge or for a recommendation of a reduced sentence the court shall . . . [a]fter excising any portion it deems irrelevant or prejudicial, permit the jury to inspect the agreement . . . and . . . [a]llow the defense counsel to cross-examine fully the defendant who is testifying concerning the agreement." 1991 Nev. Stat., ch. 153, § 3, at 291-92.

prevents further relitigation of this issue.²⁸ Therefore, appellant is not entitled to relief on this claim.

Fourteenth, appellant claimed that his appellate counsel was ineffective for failing to challenge Felix Austria's testimony on the ground that it was "purchased" because Austria was offered a deal for his testimony and was allegedly promised that he could return to the Philippines.²⁹ We conclude that appellant failed to demonstrate that his appellate counsel's performance was deficient or that this issue had a reasonable probability of success on appeal. The fact that Austria was offered a deal for his testimony does not render his testimony inadmissible.³⁰ The jury was presented with these facts and instructed to consider a witness's motive and interests in determining credibility. Detective Eddie Newman testified that he did not promise Austria he could return to the Philippines and did not know who told Austria that he could return to the Philippines. Therefore, appellant is not entitled to relief.

²⁸Hall v. State, 91 Nev. 314, 535 P.2d 797 (1975).

²⁹Appellant also appeared to have argued that Austria's testimony should not have been allowed because it exculpated appellant in the planning of the crime. Appellant's claim is belied by the record.

³⁰NRS 175.282; Acuna, 107 Nev. 664, 819 P.2d 197.

Fifteenth, appellant claimed that his appellate counsel was ineffective for failing to argue that the State improperly bolstered Austria's credibility by telling the jury about the deal Austria received for his testimony. Appellant believed that by telling the jury about the deal it made it more likely that Austria was being truthful because the prestige of the office of the prosecutor supported the deal made with Austria. Appellant failed to demonstrate that his appellate counsel's performance was deficient or that he was prejudiced. Appellant's own trial counsel elicited testimony about the deal on cross-examination of Austria. Appellant failed to specifically indicate how the State otherwise bolstered the credibility of Austria.³¹ Therefore, appellant is not entitled to relief.

Sixteenth, appellant claimed that his appellate counsel was ineffective for failing to argue that Austria's testimony was not credible because either Chuatoco or Austria, the other two masked gunmen in Renata's during the attempted robbery, could have shot Serna. Appellant stated that Chuatoco replaced appellant during the attempted robbery. Appellant failed to demonstrate that his appellate counsel's performance was deficient or that he was prejudiced. It was for the jury to decide the credibility of the witnesses. Again, as discussed above, it was immaterial which of the three armed, masked gunmen shot and killed Serna during

³¹Hargrove, 100 Nev. 498, 686 P.2d 222.

the attempted robbery of Renata's. Further, the evidence produced at trial established that Austria had shot the bartender and that appellant had shot and killed Serna. There was no evidence or testimony presented that Chuatoco had fired a shot or that Chuatoco had replaced appellant during the attempted robbery. Therefore, appellant is not entitled to relief on this claim.

Seventeenth, appellant claimed that his appellate counsel was ineffective for failing to argue that the district court abused its discretion in preventing the jury from hearing that the State had presented an offer to appellant prior to trial of one count of first degree murder with the use of a deadly weapon. We conclude that appellant failed to demonstrate that his appellate counsel's performance was deficient or that he was prejudiced. Appellant failed to indicate how the jury's knowledge of this offer would have altered the outcome of the trial. In fact, appellant's defense counsel informed the district court that they did not want the offer to be presented to the jury. The district court agreed and cautioned the attorneys not to mention the offer because the district court did not want appellant's rejection of the offer to prejudice the jury. We conclude that the district court did not abuse its discretion in cautioning the attorneys. Therefore, appellant is not entitled to relief on this claim.

Eighteenth, appellant claimed that his appellate counsel was ineffective for failing to challenge the jury instructions on reasonable doubt, malice, and premeditation.³² We conclude that appellant failed to demonstrate that appellate counsel's performance was deficient or that this issue had a reasonable probability of success on appeal. The jury was properly instructed pursuant to the controlling statutes and caselaw in effect at the time of his crime and trial.³³ Therefore, appellant is not entitled to relief.

Finally, appellant claimed that his appellate counsel was ineffective for failing to argue that his due process and double jeopardy

³²To the extent that appellant argued that his trial attorneys were ineffective for failing to object to these jury instructions, we conclude that appellant failed to demonstrate that his attorneys were ineffective.

³³NRS 175.211 (setting forth definition of reasonable doubt); NRS 200.010 (defining murder); NRS 200.020 (defining malice); NRS 200.030 (setting forth the degrees of murder); Kazalyn v. State, 108 Nev. 67, 75-76, 825 P.2d 578, 583-84 (1992) (holding nearly identical instructions of premeditation and malice aforethought adequately instructed the jury); Lord v. State, 107 Nev. 28, 40, 806 P.2d 548, 555-56 (1991) (holding that the definition of reasonable doubt set forth in NRS 175.211 satisfies due process); see also Leonard v. State, 117 Nev. ___, 17 P.3d 397, 411 (2001) (holding no error in providing Kazalyn jury instruction); but see Byford v. State, 116 Nev. 215, 233-37, 994 P.2d 700, 712-13 (2000) (reconsidering the Kazalyn instruction and determining that further instruction explaining deliberation would be preferable).

rights were violated due to the “variety of convictions along with the enhancements.” Appellant failed to offer any specific facts in support of this claim.³⁴ Application of the deadly weapon enhancement to the various offenses did not violate double jeopardy or due process.³⁵

In reviewing appellant’s final claim of ineffective assistance of appellate counsel, we noted some tangential issues relating to this claim that appointed post-conviction counsel would have been able to assist appellant in presenting in a factually specific and cogent argument. First, it appears that there may not have been sufficient factual support for appellant’s attempted robbery convictions of Murr, the bartender, and Serna, the slot manager.³⁶ Robbery of the cashier’s cage was the stated objective of the scheme to rob Renata’s. There was no evidence presented that either Murr or Serna had access or a possessory interest in the money kept in the locked cashier’s cage. Although there was testimony that Murr and Serna had access to some money at Renata’s, there was no evidence that the masked gunmen attempted to rob Murr or Serna of that money.

³⁴Hargrove, 100 Nev. 498, 686 P.2d 222.

³⁵Woofter v. O’Donnell, 91 Nev. 756, 542 P.2d 1396 (1975).

³⁶Phillips v. State, 99 Nev. 693, 669 P.2d 706 (1983) (reversing a conviction for robbery where victim did not have any possessory interest in the property taken).

Second, it appears that there may not have been sufficient factual support for the convictions of kidnapping with the use of a deadly weapon of Murr, the bartender, and Serna, the slot manager. This court has held that asportation would be required "when the kidnapping is incidental to another offense, such as robbery, where restraint of the victim is inherent with the primary offense."³⁷ In Clem, this court noted that a kidnapping would not be incidental to the underlying offense if the restraint increased the risk of harm to the victim or had an independent purpose and significance.³⁸ Murr and Serna were held at gunpoint by masked gunmen intent on robbing the cashier's cage in Renata's. In the instant case, it appears that the kidnapping was incidental to the robbery, and it appears that there was no evidence of restraint or asportation. Therefore, at this time, we cannot conclude that the district court properly denied appellant's final claim that his appellate counsel was ineffective.

In his petition, appellant requested the appointment of post-conviction counsel. Appellant stated that he possessed a limited understanding of the English language because he was a native Filipino and had only a ninth grade education. Appellant further stated that the

³⁷Clem v. State, 104 Nev. 351, 354, 760 P.2d 103, 105 (1988) overruled on other grounds by Zgombic v. State, 106 Nev. 571, 798 P.2d 548 (1990).

³⁸Id.

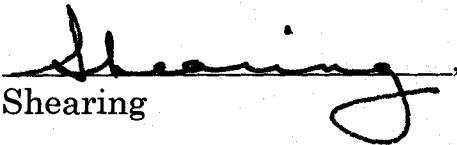
petition was being prepared with the assistance of inmate law clerks. Appellant submitted an affidavit of indigency and a financial certificate from an inmate services accountant demonstrating appellant's indigency. Because of the complexity of the issues described in the paragraph above, appellant's limited understanding of English, the severity of the penalties sought and imposed, and appellant's indigency, we conclude that the district court abused its discretion in failing to appoint counsel to assist appellant in the post-conviction proceedings.³⁹ Therefore, we reverse the district court's order denying appellant's petition as it related to the final claim described in this order and remand this matter for further proceedings in the district court, including the appointment of post-conviction counsel. Post-conviction counsel may supplement the petition with the issues described in the paragraph above and any other arguably meritorious issue not previously addressed by this court. We affirm the district court's order as it relates to the remainder of claims raised in appellant's petition.

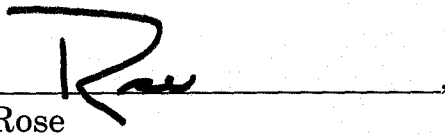
Having reviewed the record on appeal and for the reasons set forth above, we conclude that oral argument and briefing are unwarranted in this matter.⁴⁰ Accordingly, we,

³⁹NRS 34.750(1).

⁴⁰See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

ORDER the judgment of the district court AFFIRMED in part and REVERSED in part and REMANDED for further proceedings consistent with this order.⁴¹


Shearing J.


Rose J.


Becker J.

cc: Hon. Kathy A. Hardcastle, District Judge
Attorney General/Carson City
Clark County District Attorney
Ruel Salva Mercado
Clark County Clerk

⁴¹This order constitutes our final disposition of this appeal. Any subsequent appeal shall be docketed as a new matter.